ROHANI TENGKAH

v.

ZAINAL LANI & ANOR

HIGH COURT MALAYA, SHAH ALAM
MOHD HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 12-173-2000]
25 JANUARY 2002
(20 DECEMBER 2003)

ROAD TRAFFIC: *Negligence - Lorry colliding into motorcycle while overtaking - Oncoming lane not used for overtaking - Whether overtaking in dangerous manner - Finding of contributory negligence on part of motorcyclist - Whether unsupported by evidence*

DAMAGES: *Fatal accident - Loss of dependency - Multiplicand - Deceased earning RM1,300 per month - Multiplicand of RM500 - Whether too low - Deductions of non-living expenses items thereof - Whether wrong in law - Civil Law Act 1956 s. 7(3)(iv)(c), (d)*

The plaintiff's husband ('the deceased') succumbed to death when a motor lorry driven by the first defendant collided into the motorcycle he was riding. In the claim for negligence that followed, evidence was adduced that the accident took place because the motor lorry, in trying to overtake the motorcycle, had not sufficiently utilised the oncoming lane for the purpose. Evidence was further adduced that the accident occurred at a stretch where there was a double line sign on the road. The evidence notwithstanding, the learned Sessions Court judge ruled that the plaintiff was 25% liable for the accident, on account purportedly of the unchallenged evidence of the first defendant that the plaintiff was riding the motorcycle 'dalam keadaan ke tengah ke tepi', and upon his finding that the deceased could have wavered to the right while being so overtaken. The plaintiff appealed and argued that the finding of contributory negligence was wrong in law and unsupported by evidence. That aside, the plaintiff also appealed against the multiplicand of RM500 used by the trial judge in calculating the sum to be awarded, arguing that it was too low in the light of the plaintiff's monthly earnings of RM1,300, and further, against the deduction of 1/4 from the award for contingencies and vicissitudes of life and accelerated payment on the ground that s. 7(3) of the Civil Law Act 1956 ('the Act'), by prescribing the statutory multiplier in the computation of future loss of earnings, has already taken those factors into account.

Held:

[1] The first defendant had not discharged the evidential burden of proving on a balance of probabilities that the deceased was guilty of contributory negligence. The first defendant was driving dangerously when he tried to overtake the motorcycle without fully using the oncoming lane. In not utilising the lane, the first defendant must have squeezed his lorry as much as possible in the same lane as the motorcyclist's lane, thereby creating a very dangerous situation for the motorcycle. Therefore, not only did the first defendant violate the no-overtaking rule but had also carried out the overtaking in a dangerous manner. (p 113 b-e)

[2] It was not correct to say that the first defendant's statement that the deceased's motorcycle was moving 'ke tengah ke tepi' was not challenged. The notes of evidence showed that that evidence was in fact challenged by the plaintiff's counsel during the cross-examination of the first defendant. (p 114 f)

[3] The finding of contributory negligence by the learned trial judge was also against the weight of evidence. The first defendant's statement that the deceased was "menunggang dalam keadaan ke tengah dan ke tepi" was vague. Bearing in mind that the motorcyclist was dead and hence there was no likelihood of the evidence being rebutted, such vague evidence should be viewed with suspicion and not be so easily accepted. In any case, even if the first defendant's evidence were to be taken on its face value, it would be too vague to form the basis of a finding of contributory negligence. (p 115 a-c)

[4] The approach taken by the learned trial judge in calculating the multiplicand was wrong in law. The learned judge could not ignore the RM400 which the deceased kept for himself, and therefore, should have taken the whole of the deceased's earning of RM1,300 as the base figure for his calculation. Further, he should not have deducted therefrom the RM400 the deceased kept for himself, or the RM100 the plaintiff gave to the deceased's parents, or the RM100 the plaintiff gave to her own parents, or the RM40 the plaintiff gave to her younger sibling or the RM160 allegedly spent on food consumed by the deceased. There was no basis for him to do so, as what could be deducted were the deceased's living expenses. The court could not treat the RM400 so withheld by the deceased to be his living expenses, there being no evidence that the money had been used for such expenses. (pp 116 h-i & 117 a-h)

[5] It is however a fact of life that each one of us who earns will incur living expenses. In the circumstances, bearing in mind the "modern trend" approach in *Low Suit (MW) & Tan Mee Kiau v. Lim Sun Hiang & Anor* [1992] 2 CLJ 1035, the court would deduct approximately 1/3 from the deceased's monthly earnings of RM1,300 as the deceased's living expenses and arrive at a multiplicand of RM900. The appeal in this respect was allowed and the award was accordingly adjusted. (p 118 d-g)

[6] This court was bound by the decision of the Court of Appeal in *Takong Tabari v. Government of Sarawak & Ors & Another Appeal*, which, following the Federal Court in *Chan Chin Min & Anor v. Lim Yoke Eng* made it clear that the common law practice of making deductions for contingencies of life and accelerated payment continues to be in force despite the provisions of s. 7(3)(iv)(d) of the Act. The court would therefore dismiss the plaintiff's appeal in respect of deduction for contingencies and vicissitudes of life and accelerated payment. (pp 119 f & 120 g)

Obiter:

There is no provision for a further deduction for "contingencies and vicissitudes of life and accelerated payment" in the scheme of s. 7 of the Act. That section has also specified or prescribed in detail the method of calculation and what should be included and excluded or deducted. There is therefore much force in the plaintiff's argument against such deductions. It is therefore hoped that the time will soon come for the Federal Court to consider *Takong Tabari* and reconsider *Chan Chin Min.*

[Appeal partly allowed.]

Case(s) referred to:

Chan Chin Ming & Anor v. Lim Yoke Eng [1994] 3 CLJ 687 SC

Chang Chong Foo v. Shivanathan [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 SC ***(refd)***

Low Suit (MW) & Tan Mee Kiau v. Lim Sun Hiang & Anor [1992] 2 CLJ 1035 ***(foll)***

Marappan & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC ***(dist)***

Rebecca Mathew & Ors v. Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor [1990] 1 MLJ 443

Takong Tabari v. Government of Sarawak & Ors & Another Appeal [1998] 4 CLJ 589 CA ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 7(3)

For the appellant/plaintiff - Daljeet Singh (Sarjeet Singh); M/s Daljeet S Sachdev & Co

For the respondents/defendants - Adrian Thambyrajah; M/s Azim Tunku Farik & Wong

Reported by WA Sharif

JUDGMENT

Mohd Hishamudin Yunus J:

This is an appeal by the appellant/plaintiff against the decision of the learned Sessions Court Judge who, in allowing the plaintiff's claim for negligence (running down) against the respondents/defendants, made a finding that the plaintiff was guilty of contributory negligence; and, as a consequence, reduced the award by 25%.

The appeal is against the finding of contributory negligence as well as on quantum.

The facts of the case are as follows.

On 23 March 1998, a road accident occurred along the Klang-Port Dickson main road, at km 62. Tne accident involved a collision between a motorcycle and a lorry. The motorcycle was driven by the deceased husband of the plaintiff, whilst che lorry was driven by the 1st defendant. The deceased husband of the plaintiff died of injuries sustained as a result of the accident. He was 27 years old when he died.

The 1st defendant is sued by the wife and children of the deceased, as dependants, for the tort of negligence, whilst the second defendant, as the registered owner of the lorry as well as the employer of the 1st defendant, is sued for vicarious liability in respect of the tort of the 1st defendant.

The deceased was an Orang Asli who lived with his family in Kampung Orang Asii Tanjung Sepat.

It is not disputed that on the day the question the deceased's motorcycle and the 1st defendant's lorry were travelling in the same direction, that is to say, from the direction of Klang towards the direction of Port Dickson; and that the deceased's motorcycle was travelling in front of the 1st defendant's lorry. It is also common ground that the collision occurred while the 1st defendant's lorry was in the midst of overtaking the deceased's motorcycle.

It is, however, the contention of the plaintiff that the 1st defendant was negligent in that he tried to overtake the deceased's motorcycle when in the circumstances it was dangerous to do so; the circumstances being:

(a) that there was a "double line" traffic sign on the road, meaning that the 1st defendant was prohibited from overtaking;

(b) that to the front of both vehicles, there was a junction to the right leading to an Orang Asli settlement known as Kampung Orang Asli Tanjung Sepat; and

(c) that both vehicles were travelling in a residential kampong area.

Based on the evidence, the learned Sessions Court Judge made a finding that the 1st defendant was negligent when he overtook and knocked the deceased's motorcycle. There is no appeal by the defendants against the finding of negligence by the learned Sessions Court Judge.

However, the learned Sessions Court Judge at the same time also found the deceased motorcyclist guilty of contributory negligence and, accordingly, reduced the award by 25%.

The plaintiff's first ground of appeal is against this finding of 25% contributory negligence. The plaintiff contends that there was no contributory negligence on the part of the deceased.

I allowed the appeal in respect of this first ground.

In my view there is no basis to hold that the deceased was guilty of contributory negligence.

The burden is on the 1st defendant to prove on a balance of probabilities that the deceased was guilty of contributory negligence. I do not think that that legal and evidential burden was successfully discharged by the 1st defendant. The evidence of the 1st defendant as to how the accident occurred is not at all that clear.

In my judgment, the 1st defendant was driving dangerously when he tried to overtake the deceased on a stretch of road where not only was overtaking prohibited by law (because of the traffic double line sign) but at the same time he overtook the deceased without fully using the oncoming lane. It can be fairly inferred from the sketch plan that the 1st defendant did not use the oncoming lane to overtake the deceased's motorcycle because the lorry brake marks began not on the oncoming lane but from the centre double line. That this was so is also clear from his evidence when he said:

> Selepas bunyikan hon motosikal itu terus ke tepi. Bila motosikal ke tepi soya pun cuba hendak memotong dia. Tayar kanan lori soya masuk ke sebelah kanan kerana saya hendak memotong. Saya memasuk ke kanan lebih kurang 1 kaki sahaja.

From the above evidence, the question arises: when the 1st defendant wanted to overtake, why did the 1st defendant manoeuvre his lorry to the extent that only the right wheel of the lorry move one foot (or more) onto the oncoming lane? Why did he not move the whole lorry onto the oncoming lane? That he did not do so only goes to show that in trying to overtake the deceased's motorcycle, the 1st defendant was not making full use of the oncoming lane but, instead, was trying to squeeze his lorry as much as possible in the same lane as the motorcyclist's lane, thus creating a very dangerous situation for the motorcycle. Therefore, not only did the 1st defendant violate the no-overtaking rule but he had also carried out the overtaking in a dangerous manner.

That the 1st defendant was a dangerous driver was further borne out by the following facts that reflect poorly his attitude on road safety. First, he did not take traffic signs seriously; for, he admitted not noticing the traffic double line traffic sign. Second, he was determined to overtake the deceased's motorcycle although he knew that under the circumstances it was dangerous to do so. This is borne by his own evidence when he said:

> Saya tak perasan tempat itu ada double line. Saya masuk ke kanan sebab keadaan merbahaya. **Saya hendak memotong dia juga.** Bahaya kerana dia menunggang dalam keadaan ke tengah dan ke tepi. (emphasis added)

The 1st defendant, however, in his evidence, did not allege contributory negligence on the part of the deceased's motorcyclist. Instead, he put the blame on the motorcyclist. But, as I have said, his account is not that all too clear. He alleged that it was not his lorry that grazed into the deceased's motorcycle from the rear, but on the contrary, it was the deceased' motorcycle that moved from the edge of the road to the centre of the road, while the 1st defendant was in the midst of overtaking, and knocked (or grazed) into the left side of the 1st defendant's lorry. He said:

> Saya potong motosikal itu dan motosikal itu pergi ke tengah jalan. Motosikal itu kena pada bahagian kiri hadapan lori saya.

I am unable to accept this account of the accident by the 1st defendant which implies that the deceased was not guilty of contributory negligence but was guilty of negligence himself.

The learned Sessions Court Judge's reasoning for the finding of contributory negligence on the part of the deceased motorcyclist is given by as follows:

> Setelah mendengar keterangan Defendan (1) dan keterangan Pegawai Penyiasat serta meneliti kepada rajah kasar, saya puashati bahawa kemalangan ini berlaku adalah disebabkan oleh kecuaian Defendan (1) yang memandu dalam keadaan yang merbahaya. Walau bagaimanapun versi Defendan (1) tidak dicabar apabila dia mengatakan bahawa dia telah membunyikan hon sebelum memotong dan bahawa motosikal si mati dalam keadaan ke tengah ke tepi. Selain itu saya juga percaya besar kemungkinan berlaku kemalangan seperti versi Defendan (1) iaitu semasa proses memotong, motosikal si mati bergerak ke kanan untuk tujuan masuk ke Simpang Tg. Sepat yang berada di kanan. Oleh itu kemalangan berlaku dalam keadaan bergesel. Oleh itu saya mendapati terdapat sedikit kecuaian sumbangan di pihak si mati sendiri dan saya memutuskan kecuaian si mati setakat 25% dan liabiliti terhadap Defendan-Defendan setakat 75% sahaja.

With respect, I am not able to agree with the above rationale. Let us analyse the above passage. First, it is said:

> Walaubagaimanapun versi Defendan (1) tidak dicabar apabila dia mengatakan bahawa dia telah membunyikan hon sebelum memotong dan bahawa motosikal si mati dalam keadaan ke tengah ke tepi.

The above statement is, with respect, only partially correct. True, the 1st defendant's evidence was not challenged when he said that he did sound his horn. But this evidence is insignificant on the issue of contributory negligence. For, according to the 1st defendant, after he had sounded his horn the motorcyclist moved to the side of the road. However, with respect, it is not correct to say that the 1st defendant's statement that the deceased's motorcycle was moving to the centre and to the side of the road was not challenged. For, from, the notes of evidence, the 1st defendant's evidence was in fact challenged by the plaintiff's counsel during the cross-examination of the 1st defendant. It is clear from p. 39 of the Appeal Record as follows:

> Q: Saya katakan motosikal itu di hadapan awak dan tak sama sekali ke tengah dan ke tepi?
>
> A: Tak setuju.

Further, it is important to note that the 1st defendant merely said:

> Bahaya kerana dia menunggang dalam keadaan ke tengah dan ke tepi.

This statement is vague. What did the 1st defendant mean by this evidence? There was no clarification or elaboration by the witness. Bearing in mind that the motorcyclist is dead and hence there is no likelihood of the evidence being rebutted, such vague evidence as this should not have been so easily accepted by the Sessions Court on its face value; instead it must be viewed with suspicion. And it is ail the more so when this evidence is not consistent with the police report made by the 1st defendant after the accident. In his police report lodged on the same day after the accident, his description as to what preceded the accident was not as mild or vague as his testimony in court: for in the report his allegation against the deceased was a little clearer but more serious. There, the 1st defendant had used the word "hoyong hayang" (swaying to the left and to the right) to describe the manner the deceased rode his motorcycle. In any case, even if the 1st defendant's evidence were to be taken on its face value, still it is too vague to form the basis of a finding of contributory negligence.

Then the learned Sessions Court Judge goes on to state:

> Selain itu saya juga percaya besar kemungkinan berlaku kemalangan seperti versi Defendan (1) iaitu semasa proses memotong, motosikai si mati bergerak ke kanan untuk tujuan masuk ke Simpang Tg. Sepat yang berada di kanan.

This statement, with respect, is also not correct. There is nothing in the 1st defendant's evidence (except in his police report) that states that the deceased's motorcycle moved to the right with the intention of entering the side road on the right that lead to Tg. Sepat.

My conclusion on this issue is that the finding of contributory negligence by the learned Sessions Court Judge was against the weight of evidence.

The next ground of appeal is on the multiplicand used by the learned Sessions Court Judge in calculating the sum to be awarded. The deceased earned RM1,300 per month. He had a wife and two children (all three are the plaintiffs in the present dependency claim). Out of the RM1,300, he gave RM900 to his wife/plaintiff (a housewife) for the family expenses. No evidence is lead as to what happened to the RM400 (ie, RM1,300-RM900 = RM400) kept by the deceased. From the RM900 that she received from the deceased, the plaintiff/ wife in turn gave RM100 to the deceased's parents, ie, her in-laws, RM100 to her own parents, and RM40 to her adik (ie, a younger sibling, but it is not stated in the evidence whether it was a younger brother or a younger sister of the plaintiff).

From the monthly earnings of RM1,300, the learned Sessions Court Judge arrived at a multiplicand of RM500. This is how he arrived at this sum of RM500. The learned Sessions Court Judge began with the figure of RM900 as his base figure. He did not explain why he did not use the monthly earnings of RM1,300 as his base figure. Be that as it may, from the sum of RM900, the learned Sessions Court Judge made several deductions, that is to say:

(a) he deducted a sum of RM100 which the plaintiff/wife gave to the deceased's parents;

(b) he deducted a sum of RM100 which the plaintiff/wife gave to her own parents; and

(c) he deducted a sum of RM40 which the plaintifi/'wife gave to her younger sibling;

and arrived at the balance sum of RM660. From this balance sum of RM660, the judge made a further deduction of RM160 (I must admit, here that the learned Sessions Court Judge did not specifically mention the amount "RM160" but this sum is arrived at arithmetically by subtracting RM500 from RM660) on the ground that die deceased, whilst alive, lived with the plaintiff/wife and children and "consumed the food bought by the plaintiff/wife". In deducting the sum of RM160, this is what the learned Sessions Court Judge said:

> Oleh kerana si mati ringgal di rumah yang sama dan makan di rumah atas makanan yang dibeli oleh plaintiff, maka ini juga harus diambilkira untuk tolakan. Oleh itu saya berpendapat hilang tanggungan kepada Plaintif dengan 2 orang anaknya dalam kes ini adalah sebanyak RM500 sebulan adalah munasabah.

Having made the deduction of RM160, the learned Sessions Court Judge arrived at the multiplicand of RM500.

The learned counsel for the appellant submitted that a multiplicand of RM500 was too low, considering that the monthly earnings of the deceased was RM1,300. He proposed a multiplicand of RM900.

The learned Sessions Court Judge did not cite any authority to justify the various deductions that he had made.

In my judgment, and with respect, the approach taken by the Sessions Court Judge was wrong in law. He should have taken the whole of the deceased's earnings of RM1,300 as the starting point (ie, as the base figure). He cannot ignore the RM400 which the deceased kept to himself. He should not have deducted from the base figure of RM1,300:

(a) the RM400 which the deceased kept to himself;

(b) the RM100 which the plaintiff/wife gave to the deceased's parents;

(c) the RM100 which the plaintiff/wife gave to her own parents;

(d) the RM40 which the plaintiff/wife gave to her younger sibling; and

(e) the RM160 which he (the judge) estimated to be the sum spent for food consumed by the deceased.

There is no legal basis for him to do so. Under the law, what can lawfully be deducted from deceased's earnings are the deceased's living expenses. This is stipulated by para. (iv)(c) of the proviso to sub-s. (3) of s. 7 of the Civil Law Act 1956. Paragraph (iv)(c) of the proviso states:

> (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> ...
>
> (c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death.

What, then, is "living expenses"? In *Chang Chang Foo v. Shivanathan* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 Harun Hashim SCJ said:

> What then is meant by living expenses in (iii)? It is crite taw that words in a statute must be given their ordinary meaning. *The Shorter Oxford English Dictionary* defines 'living' as: The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance. 'Expenses' means 'Money out of pocket'.

In my judgment, all the above items (with the exception of item (e)) are not the deceased's living expenses. As to item (a), just because from the earnings of RM1,300 the deceased kept this sum of RM400 to himself and only gave RM900 to the plaintiff/wife, the court cannot treat the RM400 so withheld to be the living expenses of the deceased. There must be evidence that the deceased used the money for his living expenses, like buying clothes and food. What were given away by the plaintiff to various persons under items (b) to (d) on her own freewill are obviously not the living expenses of the deceased. As to item (e), granted that the deceased's food expenses can be taken as his living expenses, still, it was only a part of his living expenses and there is no evidence to justify the deduction of a. specific sum of RM160. Such quantification was mere guesswork.

As I see it, para. (iv)(c) of the proviso can give rise to problems of interpretation. For instance, if this paragraph is given a literal interpretation, plaintiffs claiming through a victim who had lived an extravagant life will be penalised relative to plaintiffs who claim through the thrifty victim (Reiss, Seth M, Quantum for future loss in personal injury and fatal accident cases after the Civil Law (Amendment) Act 1984, MLJ, Aug. 1985 Ixii at Ixvi n. 50). In the context of the present case, a literal interpretation of'the paragraph would mean that-there .would not be any deduction at all for living expenses since, strictly, by relying on items (a) to (e) above, no sum "is proved or admitted to be the living expenses of the deceased" (or, perhaps, there should only be a minimal deduction for living expenses in the light of item (e), though the amount to be deducted need not necessarily be RM160). But, surely, this cannot be the case. It is a fact of life that each one of us, who earns, will incur living expenses.

With the foregoing difficulty in mind, in the case that is now before me, I do not propose to give the paragraph a literal interpretation. Instead, I propose to adopt what LC Vohrah J in *Low Suit (m. w.) Administratrix of the estate of Tan Mee Ho (J) and Tan Mee Kiau (f) both deceased v. Lim Sun Hiang t/a Syarikat Ta Thong & Anor*. [1992] 2 CLJ 1035; [1992] 2 CLJ (Rep) 813 called the "modern trend", that is, the practice of merely deducting a percentage from the monthly earnings, instead of going through labouriously and painstakingly in detail on the various expenditures incurred by the deceased when alive, in order to determine his living expenses. In the case cited, the learned judge, having referred to *Rebecca Mathew & Ors v. Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor* [1990] 1 MLJ 443 said:

> ... I would, in accordance with the modem trend, deduct one-third from the first deceased's wages as living expenses leaving the remainder as surplus income. Similarly for the second deceased.

Accordingly, following the modern trend, I shall deduct approximately 1/3 (strictly, 1/3 of RM1,300 is RM433, but for ease of calculation, I propose to round up the figure to RM400) from the deceased's monthly earnings of RM1,300 and arrived at the multiplicand of RM900 (ie, RM1,300-RM400 = RM900). The appeal in respect of the multiplicand is thus allowed. The award is adjusted accordingly based on this new multiplicand.

Just for the record, the multiplier used by the learned Sessions Court Judge in calculating the loss of earnings was 16, since the deceased was 27 years old at the time of his death. This is in conformity with para. (iv)(d) of the proviso to s. 7(3). The adoption of this multiplier is accepted by the appellant and respondents.

The third ground of appeal concerns the deduction by the learned Sessions Court Judge of 1/4 from the award for contingencies and vicissitudes of life and accelerated payment. The relevant part of his judgment reads:

> Bagi kehilangan tanggungan selepas perbicaraan untuk baki 160 bulan adalah berjumlah RM80,000. Walau bagaimanapun (dari) jumlah ini ditolak 1/4 menjadikan jumlah yang dibenarkan untuk hilang tanggungan selepas perbicaraan sebanyak RM60,000. Penolakan ini adalah bagi kontigensi, jatuh bangun kehidupan dan bayaran terkumpul seperti yang diputuskan dalam kes *Takong Tabari v. Government of Sarawak* [1998] 4 CLJ 589.

The learned counsel for the appellant/plaintiff in his written submission argued that there should not be this further deduction for contingencies and vicissitudes of life and accelerated payment since s. 7(3) of the Act, by prescribing the statutory multiplier in the computation of future loss of earnings, has already taken into account contingencies and vicissitudes of life and accelerated payment. Learned counsel refers to *Marappan & Anor v. Siti Rahmah binti Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174.

It is not clear why the learned Sessions Court Judge made a deduction of only l/4 for contingencies and vicissitudes of life and accelerated payment when *Takong Tabari @ Takung Tabari, (suing in her personal capacity and as administratrix of the estate of Jeffrey Satuk Gabar, deceased) v. Government of Sarawak & 2 Ors (and Anor Appeal)* [1998] 4 CLJ 589 prescribes a deduction of one third.

Be that as it may, I do not propose to disturb this part of the decision since as a High Court Judge I am bound by the decision in *Takong Tabari,* a decision of the Court of Appeal. In *Takong Tabari*, Siti Norma Yaakob JCA (as she then was) in delivering the decision of the Court of Appeal said (at p. 4005-4006):

> The learned trial Judge did not stop there but went on to deduct a sum of RM90,000 equivalent to 1/3 from the total sum calculated thereby leaving a balance of RM180,000 payable. Apart from stating that the 1/3 deduction was for contingencies, other vicissitudes of life and accelerated payment, he did not identify what such deduction relate to.
>
> It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s. 7(3)(iv) of the Act 67 on October 1, 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this

case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention she relies on the minority decision of the Supreme Court in the case of *Chan Chin Min & Anor v. Lim Yoke Eng (lawful mother of Gan Swee Hock, deceased)* [1994] 3 CLJ 687.

As a court that is inferior to the Supreme Court, we are bound by the principle of *stare decisis* to accept the majority decision in *Chan*'s case. That majority judgment states that as a matter of interpretation if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contingencies of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

However, be that as it may, with the greatest respect and in all humility, I cannot resist the temptation to remark that as there is no provision for a further deduction for "contingencies and vicissitudes of life and accelerated payment" in the scheme of s. 7 of the Act, ancl that that section has already specified or prescribed in detail what should be included and what should be excluded or deducted and the method of calculation, in calculating the sum to be awarded, there is much force in the argument of the learned counsel in the present case (except for his reliance on *Marappan*, for on the facts and issues that case can be distinguished) and of the counsel for the widow in *Takong Tabari*. There is also strong merit in the minority judgment of Edgar Joseph Jr SCJ in *Chan Chin Ming & Anor v. Lim Yoke Eng* [1994] 3 CLJ 687 (where, in His Lordship's opinion, to ignore the fixed multiplier of 16 years "would be to fly in the face of the mandatory provisions" of s. 7(3)(iv)(d)). I respectfully and humbly hope a time will come very soon when our Federal Court will have an opportunity to consider *Takong Tabari* and to reconsider *Chan Chin Meng*. Accordingly, the appeal in respect of the deduction of 1/4 from the award of RM80,000 of the Sessions Court Judge (which is now adjusted and increased by reason of the new multiplicand of RM900) for contingencies and vicissitudes of life and accelerated payment is dismissed.

[Appeal allowed with costs in respect of the issue of contributory negligence and multiplicand; but disallowed in respect of the issue of deduction for contingencies.]